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In the Supreme Court of the United States

OCTOBER TERM, 1962.

No. [redacted] 98

LILLIAN WINTNER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

RICHARD KATCHER,
HERBERT B. LEVINE,
1130 Keith Building,
Cleveland 15, Ohio,
Counsel for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8647

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In the Supreme Court of the United States

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No. ------

LILLIAN WINTNER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above case on January 18, 1963.

CITATIONS TO OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, is reported at 200 F. Supp. 157. No printed opinion of the United States Court of Appeals for the Sixth Circuit, in affirming the decision of the District Court, was filed; its order is printed in Appendix, *infra*, page 14.

JURISDICTION.

The order of the United States Court of Appeals for the Sixth Circuit, affirming the decision of the United States District Court for the Northern District of Ohio, Eastern Division, was entered on January 18, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Where a bank had a lien upon insurance policies by virtue of assignments thereof by the insured as security for the repayment of money borrowed by him from the bank, which lien was superior to an alleged lien of the United States on the cash surrender value of the policies, where the amount of the loans approximately equalled the cash surrender value of the policies, where the applicable state law exempted the proceeds of the policies from claims of the insured's creditors, and where the applicable state law prohibits the marshalling of assets in such a situation, should the cash surrender value first have been applied to pay the prior lien of the bank from the insurance proceeds on the decedent's death so that almost nothing remained against which the United States might enforce its lien?

2. Where a decedent filed an income tax return for the year 1946 but paid less than the full amount of tax shown to be due, where the Commissioner of Internal Revenue assessed the balance of the tax against the decedent, and where after demand numerous payments were made both before and after the death of the decedent, did the decedent "neglect or refuse" to pay the tax within the meaning of Section 3670 of the Internal Revenue Code of

1939 so that a lien attached to the cash surrender value of insurance policies on the life of the decedent which he owned?

3. Where the Commissioner of Internal Revenue asserted a deficiency against a widow as transferee of the proceeds of insurance policies on the life of her deceased husband who died owing income taxes for the year 1946 and the Tax Court entered its decision that there was no such liability due from the widow, is a subsequent action in the District Court by the United States to enforce a lien upon the cash surrender value of such insurance policies in the hands of the widow barred by the provisions of Section 6215(a) of the Internal Revenue Code of 1954 or, in the alternative, by the doctrine of res judicata?

STATUTES INVOLVED.

The statutes involved in this case are:

Internal Revenue Code of 1939:

Sec. 311 (26 U. S. C. 1952 ed., Sec. 311)
Sec. 3670 (26 U. S. C. 1952 ed., Sec. 3670)
Sec. 3671 (26 U. S. C. 1952 ed., Sec. 3671)
Sec. 3672 (26 U. S. C. 1952 ed., Sec. 3672)

Internal Revenue Code of 1954:

Sec. 6215(a) (26 U. S. C. 1958 ed., Sec. 6215(a))
Sec. 7481(1) (26 U. S. C. 1958 ed., Sec. 7481(1))
Sec. 7483 (26 U. S. C. 1958 ed., Sec. 7483)

Ohio Revised Code:

Sec. 3911.10
Sec. 3911.12

They are printed in Appendix, *infra*, pp. 15-18.

STATEMENT OF THE CASE.

This case involves a suit by the United States to collect the remaining unpaid income tax liability of Alex S. Wintner, petitioner's deceased husband, for the year 1946 from the proceeds of insurance policies which petitioner received upon his death, by seeking to enforce an alleged lien upon the cash surrender values of the policies. All of the facts in the case were stipulated by the parties.

Alex S. Wintner, a resident of Ohio (R. 12a), filed a federal income tax return for 1946, but at the time of filing the return he paid only a part of the tax shown due thereon (R. 9a). He subsequently made payments to the United States so that at the time of his death less than half of the original liability remained unpaid. After his death further payments were made (R. 15a).

During the period from 1928 to 1936 Mr. Wintner purchased eight insurance policies on his life which had a total face value of $87,500 (R. 10a). Petitioner was named as the beneficiary to receive the proceeds upon his death (R. 10a).

Mr. Wintner on various occasions had borrowed money from a Cleveland bank, to which, at the time of his death, he was indebted in the amount of $34,000. In 1948 he assigned each of the life insurance policies to the bank as collateral security for the payment of his indebtedness to it (R. 10a, 11a). Although this assignment occurred subsequent to the Commissioner of Internal Revenue's assessment of the unpaid 1946 tax liability, the lien of the bank upon the policies was superior to any lien of the United States because no notice of the latter's lien was ever filed as required by law (R. 9a).

When Mr. Wintner died in 1954, the cash surrender value of the policies was $34,503.85 (R. 10a), and the bank received $34,000 from an insurance company in full satis-

faction of his indebtedness to it (R. 11a). The balance of the proceeds, which exceeded the amount of unpaid tax liability, was paid by the insurance companies to petitioner as the named beneficiary of the policies (R. 10a, 11a).

After the death of Mr. Wintner, the Commissioner of Internal Revenue asserted a deficiency for his 1946 liability against petitioner as transferee of Mr. Wintner's assets by reason of her having received the proceeds of the insurance policies (R. 35a-37a). Petitioner filed a petition with the Tax Court of the United States contesting the Commissioner's determination (R. 33a-34a). Pursuant to stipulation of the parties the Tax Court entered its decision that there was no liability due from petitioner as transferee of her husband's assets for income taxes due for the year 1946 (R. 40a-41a).

After the time for an appeal of the Tax Court's decision had expired, the United States filed the instant civil action pursuant to Sections 7401 and 7403 of the Internal Revenue Code of 1954 (26 U. S. C. 1958 ed., Sections 7401, 7403), in which it sought to enforce an alleged tax lien on the cash surrender value of the life insurance policies (R. 3a-6a). The District Court found in favor of the United States against petitioner and ordered that the United States recover of petitioner the sum of $26,002.09, including interest. The United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court, without opinion.

REASONS FOR GRANTING THE WRIT.

1. On March 4, 1963 this Court issued a writ of certiorari to the United States Court of Appeals for the Second Circuit in the case of *Meyer vs. United States of America*, Docket No. 757. The facts in the instant case are virtually identical with those in *Meyer*, as the United States recog-

nized in its brief (p. 7) in opposition to the petition for writ of certiorari in that case.

In *Meyer*, as in the instant case, the petitioner was beneficiary of several insurance policies on the life of her husband. In 1943 her husband had pledged the policies to a bank as security for a loan, and subsequently liens arose in favor of the United States upon the husband's property for unpaid income taxes for the years 1945 and 1946. When the husband died in 1955, the amount of the bank's loan was paid to it from the policies and the remainder of the proceeds was paid to Mrs. Meyer. In the *Meyer* case the cash surrender value of the policies at the time of Mr. Meyer's death exceeded the amount of the bank's loan by $441.21; in the instant case the cash surrender value exceeded the amount of the bank's loan by $503.85. In both cases the amount of the decedent's unpaid tax liability was less than the amount of the loan and less than the amount of the cash surrender value. The only factual respect in which the two cases differ is that in *Meyer* the decedent pledged the policies to the bank prior to the time the lien arose, whereas in the instant case the pledge of the policies to the bank occurred after the date on which the alleged lien arose. However, since no notice of the tax lien in the instant case was ever filed by the United States (R. 9a), the United States' lien was junior and subordinate to the bank's lien. 1939 Internal Revenue Code Section 3672(a) (26 U. S. C. 1952 ed., Sec. 3672(a)); *United States vs. Behrens*, 230 F. 2d 504 (2d Cir. 1956), cert. denied 351 U. S. 919 (1956). Therefore, in both cases the United States' lien was junior and subordinate to that of a bank, and hence the factual difference is one without distinction.

The issue which is common to *Meyer* and the instant case is the applicability of the common law doctrine of

"marshalling assets" to federal tax liens and insurance policies. In *Commissioner vs. Stern*, 357 U. S. 39 (1958), this Court held that Section 311 of the Internal Revenue Code of 1939 (26 U. S. C. 1952 ed., Section 311), which imposes transferee liability, was merely procedural and created no substantive liability, and that substantive liability must be determined under state law. Ohio Revised Code Sections 3911.10 and 3911.12, which are similar to the Kentucky statutes involved in *Stern*, provide in substance that the proceeds of life insurance contracts which are payable to the wife of the insured shall be free from all claims of the creditors of the insured, and hence petitioner is not liable for her husband's unpaid taxes as a transfereee. In *United States vs. Bess*, 357 U. S. 51 (1958) (wherein no pledge of the policies had been made), this Court held that the cash surrender value of an insurance policy is a separate fund to which a federal tax lien may attach, that at the death of the insured there is a transfer of this fund with the lien attached, and that the proceeds in excess of the cash surrender value constitute another separate fund to which a lien may not attach.

Therefore, when Mr. Wintner died, the United States had a lien on only the fund consisting of the cash surrender value of the policies and the bank had a lien on both of the funds comprising the face amount of the policies. The lien of the government was junior and subordinate to the lien of the bank, and the United States has never contended otherwise.

The question which results is thus narrowed to whether the bank should have been paid from the fund consisting of the cash surrender value or from the fund consisting of the balance of the proceeds; if it was paid from the former, then only $503.85 remained for the United States; if it was paid from the latter, then the entire

cash surrender value remained for the United States. This is a problem of resolving the rights of competing creditors.

This Court, in *United States vs. Brosnan*, 363 U. S. 237, 242 (1960), has specifically stated that there is no federal law with respect to creditors' rights in tax liens and that the enforcement of such rights is a matter of state law:

> "We think it more harmonious with the tenets of our federal system and more consistent with what Congress has already done in this area (of federal tax liens), not to inject ourselves into the network of competing private property interests, by displacing well-established state procedures governing their enforcement, or superimposing on them a new federal rule."

See also *Commissioner vs. Stern*, 357 U. S. 39 at 45 (1958).

The courts below and in *Meyer* applied the equitable doctrine of marshalling assets, to the effect that when one creditor has a claim against two funds as security and another creditor has a claim against only one of the funds, the loan of the first will be marshalled against that fund which is security for his loan only. See also *United States vs. Behrens*, 230 F. 2d 504 (2d Cir. 1956), cert. denied 351 U. S. 919 (1956). Thus these courts, *without examining state law on the question as required by Brosnan*, determined that the bank in both cases had been paid out of the fund consisting of the proceeds of the policies in excess of their cash surrender values, thereby leaving the fund consisting of the cash surrender values intact for satisfaction of the United States' lien.

In applying the doctrine of marshalling assets, the courts below ignored the holding of *Brosnan* that state law governs creditors' rights in liens and their enforcement. The law of the State of Ohio and elsewhere is clearly to the effect that assets will *not* be so marshalled where one

of the two funds consists of property which is not subject to the claims of creditors. *Kilgore vs. Miller*, 19 Ohio Cir. Ct. 93, 10 Ohio Cir. Dec. 464 (Tuscarawas Cir. Ct. 1898); *Bernsee vs. Hamilton*, 3 Ohio Cir. Dec. 550 (Cuyahoga Cir. Ct. 1892); 35 OHIO JUR. 2d, *Marshalling Assets*, Sec. 14, page 604; *Barbin vs. Moore*, 85 N. H. 362, 159 Atl. 409 (1932); 55 C. J. S., *Marshalling Assets and Securities*, Sec. 10, pp. 969-970. Ohio Revised Code Sections 3911.10 and 3911.12 provide that the proceeds of Mr. Wintner's policies are not subject to the claims of his creditors. Therefore, under Ohio law, the doctrine of marshalling assets would not be applied to the insurance policies on the life of Mr. Wintner.

Thus, the courts below in both *Meyer* and the instant case, in relying on *Behrens*, have decided a federal question in a way which conflicts seriously with this Court's holding in *Brosnan*. In fact, a result contrary to that in *Behrens*, *Meyer*, and the instant case has been reached in cases where the insured borrowed from, and pledged his policies to, the insurer rather than a bank. See *Flax vs. United States*, 179 F. Supp. 408 (D. C. N. J. 1959); *United States vs. Pilley*, 6 AFTR 2d 5995 (D. C. W. D. Tenn. 1960). Instruction by this Court appears necessary.

Although petitioner is obviously not in a position to know the number of cases wherein the United States is attempting to enforce tax liens against insurance policies, the volume of recent reported opinions involving such policies indicates that the total number must be large. Furthermore, the problem will not abate in the future.[1]

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[1] There must be many persons who are borrowing from banks and insurance companies against the security of their insurance policies, since President Kennedy has requested a change in the income tax treatment of the interest paid by the insured on such loans. See The Message From the President of the United States Transmitting Recommendations Relative to a Revision of Our Tax Structure, submitted to the Congress on January 24, 1963.

2. The instant case also involves two important questions which are not present in *Meyer*. One is a far-reaching question of federal law which has never been, but should be, settled by this Court—a question which this Court previously reserved for decision in *Bess, supra*.

The United States instituted this action to foreclose an alleged tax lien. Section 3670 of the Internal Revenue Code of 1939 (26 U. S. C. 1952 ed., Sec. 3670) provides:

> "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

Petitioner contends that no lien upon the cash surrender value of Mr. Wintner's life insurance policies ever existed in the United States' favor under Section 3670 because Mr. Wintner never neglected or refused to pay his tax. Mr. Wintner paid $243.53 at the time of filing his 1946 income tax return (R. 9a), and thereafter payments were made at various intervals which reduced the amount outstanding on the original $35,243.53 tax liability to only $8,034.04 as of May 12, 1960 (R. 15a).

Prior to this case the question of whether a lien will arise under Section 3670 if a taxpayer fails to pay *all* of his income tax liability even though he is making continuous payments upon that liability had never been decided by the courts. In *Bess, supra*, this Court stated:

> "Mrs. Bess argues that in any event no lien attached to any property of Mr. Bess since a lien does not attach under § 3670 unless and until the deliquent taxpayer 'neglects or refuses to pay the same after demand.' She urges that the facts stipulated as to the

> payments on account of 1945 taxes made by Mr. Bess in his lifetime proved that he did not neglect or refuse to pay taxes after demand. Since, in the view we take of this case, the liability of Mrs. Bess is limited to the cash surrender value of $3,362.53, it suffices that whatever may be the case as to the 1945 taxes the requisite neglect or refusal was plainly established as to the 1946 deliquency of $3,789.32, for it is admitted that Mr. Bess neither paid nor attempted to pay anything on account of those taxes." 357 U. S. 51, 55.

In the instant case only the year 1946 is involved. Payments on the liability for that year were made before and after Mr. Wintner's death, and several attempts to compromise the liability were made (R. 12a-13a). As the District Court stated (R. 46a), "the question left undecided in the *Bess* case is squarely presented here."

Petitioner contends that the words "neglect" and "refuse" as used in Section 3670 require that there must be a willful failure to pay and that there is no evidence whatever that Mr. Wintner willfully failed to pay his tax. See *In re Crockett*, 150 F. Supp. 352 (D. C. N. D. Calif. 1957). On the contrary, the evidence shows that he was paying his tax.

Obviously, the determination of the question of whether a lien will arise under Section 3670 even if a taxpayer is making payments upon his tax liability, unless he pays the entire liability, is of great importance in the administration of the federal tax laws.

3. The other question involved here but not in *Meyer* relates to the finality of court proceedings. After the decision of the Tax Court had become final in the instant matter pursuant to Sections 7481(1) and 7483 of the Internal Revenue Code of 1954 (26 U. S. C. 1958 ed., Secs. 7481(1) and 7483), the United States filed the instant

action to foreclose its alleged lien. The decision of the Tax Court that petitioner was not liable as transferee of her husband's assets was predicated on the decision in *Stern*, *supra*. Having been thwarted in the Tax Court, the United States proceeded on a lien theory pursuant to the decision in *Bess*, *supra*.

However, Sec. 6215(a)[2] of the Internal Revenue Code of 1954 (26 U. S. C. 1958 ed., Sec. 6215(a)) provides, in pertinent part, as follows:

> "No part of the amount determined as a deficiency by the Secretary or his delegate but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by levy or by proceeding in court with or without assessment."

Although this statute directly prohibits the United States' action and although its applicability was raised by petitioner in both the District Court and the Court of Appeals for the Sixth Circuit, neither court ruled on this point. This omission is especially serious in view of the lack of any previous decisions interpreting the statute despite its long existence as a part of the Internal Revenue Code.

The United States' action is barred not only by Sec. 6215(a), but also by the doctrine of res judicata. The Tax Court litigation and the instant litigation both result from the fact that Mr. Wintner did not pay all of his 1946 income tax liability. The United States attempted in the Tax Court, and it is attempting here, to recover that single liability from Mrs. Wintner. In other words, the cause of action is the recovery of that unpaid liability for 1946. In *Commissioner vs. Sunnen*, 333 U. S. 591, 598 (1948), this Court held:

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[2] This section is substantially the same as Section 272(b) of the Internal Revenue Code of 1939 (26 U. S. C. 1952 ed., Section 272(b)).

> "Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and the same tax year."

Accordingly, the decision below involves a serious departure from the holding of this Court in *Sunnen* as to the role of the doctrine of res judicata in terminating litigation. Clarification by this Court is necessary.

CONCLUSION.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD KATCHER,
HERBERT B. LEVINE,
1130 Keith Building,
Cleveland 15, Ohio,
Counsel for Petitioner.

APPENDIX.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(January 18, 1963.)

BEFORE: CECIL, *Chief Judge*, WEICK, *Circuit Judge*, and BOYD, *District Judge*.

This cause came on to be heard upon the briefs, argument of counsel, and the full record in the case;

AND IT APPEARING that the questions on this appeal deserving of this Court's attention were expressly and correctly determined by the District Judge;

IT IS, THEREFORE, ORDERED AND ADJUDGED that the judgment of the District Court be affirmed for the reasons and upon the authorities[1] relied on in its opinion, reported at 200 F. Supp. 157.

s/ MARION S. BOYD,

United States District Judge,
Sitting by Designation.

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[1] See also later decision of the Court of Appeals for the Second Circuit in *United States v. Meyer*, 309 F. 2d 131, 10-24-62.

STATUTES.

Internal Revenue Code of 1939 (26 U. S. C. 1952 ed.).

Sec. 311. TRANSFERRED ASSETS.

(a) *Method of Collection.*—The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this chapter (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refund):

(1) *Transferees.*—The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this chapter.

* * * * *

Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

* * * * *

(f) *Definition of "Transferee."*—As used in this section, the term "transferee" includes heir, legatee, devisee and distributee. 26 U. S. C. 1952 ed., Sec. 311.)

Sec. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. (26 U. S. C. 1952 ed., Sec. 3670.)

Sec. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time. (26 U. S. C. 1952 ed., Sec. 3671.)

SEC. 3672 [as amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Sec. 505, Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under state or territorial laws.*—In the office in which the filing of such notice is authorized by the the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With clerk of District Court.*—In the office of the clerk of the United States District Court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3672.)

Internal Revenue Code of 1954 (26 U. S. C. 1958 ed.).

Sec. 6215. ASSESSMENT OF DEFICIENCY FOUND BY TAX COURT.

(a) *General Rule.*—If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the Secretary or his delegate. No part of the amount determined as a deficiency by the Secretary or his delegate but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by levy or by proceeding in court with or without assessment. (26 U. S. C. 1958 ed., Sec. 6215.)

* * * * *

Sec. 7481. DATE WHEN TAX COURT DECISION BECOMES FINAL.

The decision of the Tax Court shall become final—

(1) *Timely Petition for Review Not Filed.*—Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time;

* * * * *

Sec. 7483. PETITION FOR REVIEW.

The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in section 7482 if a petition for such review is filed by either the Secretary (or his delegate) or the taxpayer within 3 months after the decision is rendered. If, however, a petition for such review is so filed by one party to the proceeding, a petition for review of the decision of the Tax Court may be filed by any other party to the proceeding within 4 months after such decision is rendered.

Sec. 3911.10. EXEMPTION OF
CREDITORS.

All contracts of life or e
nuities upon the life of any pe
which mature and which have
fit of, or made payable by ch
or assignment to, the wife or
pendent upon such person, or
for the benefit of such wife,
or creditor, shall be held, to
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Sec. 3911.12. POLICY ASSIGN

A policy of insurance on
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a married woman, or to any p
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PROCEEDS FROM CLAIMS OF

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ED TO A MARRIED WOMAN.

the life of any person, or any
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